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IN THE

# Supreme Court of the United States

October Term, 1972

No. 71-1553

JOHN J. GILLIGAN, Governor of Ohio, *et al.*,

*Petitioners,*

vs.

CRAIG MORGAN, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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## BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

### Interest of *Amicus**

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York to assist Negroes to secure their constitutional rights through the courts. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved

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* Letters of consent from counsel for the petitioners and respondents in this case have been filed with the Clerk of Court.

by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts.

LDF has successfully litigated hundreds of suits attacking discriminatory and illegal practices of state, county and municipal authorities affecting the lives and liberties of blacks and other minorities. Wth few exceptions, LDF challenges have rested upon the irreconcilability of such practices—often required by statute—with the spirit and intent of the Fourteenth Amendment to the Constitution and upon the affirmative remedies afforded by Congress under the Civil Rights Statutes, specifically, 42 U.S.C. § 1983.**

Over the years, this Court has often pointed out that federal court jurisdiction under § 1983 must be given broad scope to carry out the purposes for which it was enacted. Here, petitioners seek to curtail drastically the scope of that important jurisdictional statute. Since the decision of the Court in this litigation may affect the scope of § 1983, LDF deems it important to bring to the Court's attention some implications of the issues here presented.

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** E.g., *Smith* v. *Allwright*, 321 U.S. 649 (1944) (voting discrimination); *Shelly* v. *Kraemer*, 334 U.S. 1 (1948) (restrictive covenants); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (school segregation); *Carter* v. *Jury Commission*, 396 U.S. 320 (1970) (jury exclusion); and *Haines* v. *Kerner*, 405 U.S. 519 (1972) (prisoners' rights).

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## Introduction

We respectfully submit that this Court should affirm the order of the Court of Appeals for the Sixth Circuit remanding this issue to the trial court for a hearing on the merits. There a record can be made which will illuminate whether the important jurisdictional statute § 1983 here at issue applies: petitioners may be found—on the facts—to be without liability, at which point the case most likely will terminate, eliminating need for decision of the § 1983 question. We believe that such a disposition is appropriate here in view of the substantial constitutional question presented by this litigation. The extent to which federal court consideration and resolution of this question may conflict with limitations imposed by the "political question" doctrine or may unduly interfere with certain basic state responsibilities are not matters which can properly be determined on the bare record before the Court here.

## Argument

At the commencement of this litigation, a federal trial court was asked to consider and resolve constitutional issues arising out of the May, 1970 confrontation between students and Ohio National Guardsmen at Kent State University. The suit had significance not merely because that incident had attracted national and world-wide attention. What happened at Kent State was but another in a series of tragic episodes involving citizens and armed troops. The suit raised issues equally relevant to these other confrontations. After the Kent State incident, as well as in the aftermath of other similar events, investigations identified inadequate training and overreaction on the part of law enforcement officials in the use of lethal weapons—in several cases, National Guardsmen—as bearing significant

responsibility for the civilian death and injury which resulted.[1]

One of the objectives of these investigations has been to exhort legislative and executive officials to seek means of preventing recurrences of such unfortunate incidents. The trial court's refusal to address itself to the issues this suit presented may well have been premised upon the view that such matters should be dealt with by other branches of government. But we submit, where the issues are properly framed, federal courts, too, have authority to adjudicate litigable matters arising out of these confrontations.

Here the issue is justiciable and within the jurisdiction of the courts of the United States. For, law enforcement officials may not inflict summary punishment upon persons charged with illegal acts. An accused is entitled to be tried, convicted and sentenced by a lawful tribunal, having been accorded at each stage all protections encompassed by "due process". *Screws* v. *United States*, 325 U.S. 91 (1941). Excessive force by law enforcement officials under normal circumstances constitutes "summary punishment" violative of the Constitution. *Monroe* v. *Pape*, 365 U.S. 365 U.S. 365 U.S. 167 (1961). Persons aggrieved by actions of law enforcement officials may seek injunctive relief against future infringement. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).

If, as the complaint herein alleges, (1) innocent students were killed or injured by Ohio National Guardsmen, (2) they were killed as a direct consequence of failure by state

[1] President's National Advisory Commission on Civil Disorders, *Report*, pp. 323-326 (Bantam Ed., 1968) (Disturbances in Detroit, Newark and other cities in 1967); President's Commission on Campus Unrest, *Report*, pp. 149-183 (Arno Press Ed., 1970) (Kent State and Jackson State in 1970); Nelson and Bass, *The Orangeburg Massacre* (1970), pp. 76-98 (South Carolina State in 1968); and *The Washington Post*, December 15, 1972, p. 1 (Southern University, Baton Rouge in 1972).

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civil and military authorities to train and arm the guardsmen properly, and (3) that failure is of a continuing nature which creates a reasonable likelihood that such conduct will be repeated in the future, then constitutional violations have occurred and are occurring which demand federal court rectification. The fact that the violations occurred and are likely to occur again under martial law conditions does not mean that they cease to be acts litigable in federal court. Martial law cannot suspend constitutional prohibitions against the infliction of summary punishment. See *Ex Parte Milligan,* 71 U.S. 2 (1886).

Where, as here, the complaint raises constitutional issues not manifestly insubstantial or frivolous, mere invocation of "political question" or "comity" doctrines should not close federal court doors to consideration of the merits of the controversy. They are not talismanic phrases sufficient to "obscure the need for case-by-case inquiry" or to preclude the court from engaging in a "delicate exercise in constitutional interpretation", *Baker* v. *Carr,* 369 U.S. 186, 211 (1962) before declining to act.[2]

We hope that this Court will not cut off resort under § 1983 to a federal forum by persons aggrieved by state action; we believe that this case surely presents no occasion to do so. That would thwart the intent of Congress "to provide at least indirect federal control over the unconstitutional actions of state officials" which state agencies might not exercise "by reason of prejudice, passion, neglect, intolerance or otherwise". *District of Columbia* v. *Carter,* 41 U.S.L.W. 4127, 4130 (January 9, 1973). Rather,

[2] E.g., in this case, claimed conflict with the federal executive and legislative branches may turn out not to exist. Regulations relating to riot control may be adequate, but perhaps were not followed by the state defendants. Therefore, federal court resolution would not interfere with the powers of coordinate branches but, instead, vindicate the exercise of such authority.

we urge that this Court reaffirm the responsibility of federal trial courts "to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1969).[3]

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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[3] Such a reaffirmation is eminently desirable in view of the recent decision by the Court of Appeals for the Sixth Circuit in *Krause* v. *Rhodes*, No. 71-1623 (6th Cir., Nov. 17, 1972) *petition for cert. filed sub nom., Scheur* v. *Rhodes*, 72-914 (41 U.S.L.W. 3377, January 9, 1973), for it appears to hold that federal court review of the Kent State incident by way of traditional § 1983 *damage* actions is foreclosed as well. That ruling, when read in conjunction with the trial court's decision here, seems to leave truly aggrieved persons out of court under § 1983 no matter what relief is being sought.

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